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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 571

ONA C. KEIPER, as Administratrix of the Estate of Ralph J. Keiper, Deceased,

Petitioner,

vs.

NORTHWESTERN PACIFIC RAILROAD COMPANY, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the District Court of Appeal, State of California,
Third Appellate District.

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to the District Court of Appeal, State of California, Third Appellate District.

Ona C. Keiper, as administrator of the estate of Ralph J. Keiper, deceased, hereinafter called petitioner, respectfully prays that a writ of certiorari

issue to review a decision of the District Court of Appeal, Third Appellate District, State of California, given August 1, 1955, hearing denied by the Supreme Court of the State of California, September 21, 1955.

OPINIONS BELOW.

The opinion of the trial Court on respondent's motion for judgment notwithstanding the verdict (C 126-132)[1] is unreported. It is annexed hereto as Appendix A. The opinion and judgment of the District Court of Appeal, State of California, Third Appellate District, is reported in 134 ACA 851, 286 P.2d 47 and is annexed hereto as Appendix B. The denial of petitioner's request for a hearing in the Supreme Court of the State of California is noted in 45 AC No. 10 Minutes at p. 3 and may be found in Appendix C hereto. Chief Justice Gibson and Justice Carter were of the opinion that a hearing should have been granted. Justice Carter's dissenting opinion is reported in 45 AC 149, 288 P2d 262 and is included herein as Appendix D.

JURISDICTION.

The judgment of the District Court of Appeal, Third Appellate District, State of California was entered on September 1, 1955. The order of the Su-

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[1]Citations to the record are as follows: C refers to the Clerk's Transcript; R refers to the Reporter's Transcipt.

preme Court of the State of California denying this petitioner's petition for a hearing was entered on September 21, 1955. Jurisdiction of this Court is premised upon the Act of Congress of June 25, 1948, c. 646, Stat. 929; 28 USCA 1257(3). Petitioner also relies on Rule 19, Paragraph 1(a) of the Rules of this Court.

QUESTIONS PRESENTED.

1. Whether the evidence was sufficient to sustain the jury's finding that the decedent, at the time he was killed, was an employee of respondent within the meaning of the Federal Employers' Liability Act?

2. Whether the evidence was sufficient to sustain the jury's finding that respondent was negligent within the meaning of the Federal Employers' Liability Act in failing to provide the decedent with a safe place to work and such negligence was a proximate cause of decedent's death?

3. Whether the evidence was sufficient to sustain the jury's finding that respondent was negligent within the meaning of the Federal Employers' Liability Act in its operation of a train and that such negligence was a proximate cause of decedent's death?

STATUTE INVOLVED.

The statute involved is the Federal Employers' Liability Act hereinafter referred to as the FELA

((April 22, 1908) 35 Stat. 65, c. 149, as amended by (April 5, 1910) 36 Stat. 291, c. 143 and (August 11, 1939) 53 Stat. 1404, c. 685, 45 USCA 51-59). The pertinent sections of the FELA are:

Section 1 (45 USC Sect. 51):

"Every common carrier by railroad while engaged in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in the case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and if none, then of the next kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such com-

merce and shall be considered as entitled to the benefits of this chapter."

Section 3 (45 USC Sect. 53):

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Section 4 (45 USC Sect. 54):

"That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employees shall not be held to have assumed the risk of his employment in any case where injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute en-

acted for the safety of employees contributed to the injury or death of such employee."

STATEMENT OF THE CASE.

A complaint[2] was filed in the Superior Court of the State of California in and for the County of Mendocino by petitioner as administratrix of the estate of Ralph J. Keiper, deceased, for her own benefit as the surviving widow of the decedent and for the benefit of the minor children of the decedent.

The complaint was in three counts. (C 23-30.) The first count was a claim under the California death statute and is not material here. The second count charged that the respondent failed to provide the decedent with a safe place to work and as a proximate result thereof, a train operated by respondent struck decedent and caused his death. Further, the count alleged that at the time of death, decedent was in the employ of respondent and that respondent and decedent were engaged in the interstate operation of a railroad along the track upon which the accident allegedly occurred. (C 26-28.) The third count alleges that decedent's death was caused by respondent's negligent operation of a train. The allegations that decedent was in the employ of respondent at the time of death and that respondent and decedent were

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[2]In fact, two complaints were filed. The two complaints were identical and were ordered consolidated into one action, being Action No. 16,877. References to the complaint are to the amended complaint in Action No. 16,877.

engaged in interstate commerce at the time of death, are repeated. (C 29.)

Respondent's answer to the complaint, for all practical purposes, denied all the allegations of the complaint save that it was admitted that respondent was a common carrier by rail, in interstate commerce. As an affirmative defense, it was alleged in the answer that the carelessness and negligence of decedent were the proximate cause of his death. (C 37-41.)

A jury trial was had. Briefly summarized, the evidence was as follows:

Decedent was a welder employed by respondent. (R 81.) On October 27, 1949, he was assigned to weld a rail jetty near Echo, California (R 81) for the purpose of protecting a wall which prevented respondent's right of way from being washed away by high water. The water had already washed a hole in the right of way. (R 94.) Decedent's regular hours of work were from 7:00 A. M. to 11:00 A. M. and from 11:30 A. M. to 3:30 P. M. (R 81); however, if an emergency arose in the area in which he was working, he was subject to call (R 95).

Decedent's employment regularly took him away from home, Ukiah, California, and he came home for week ends. (R 33.) On October 27, 1949, respondent moved decedent and his outfit by outfit rail car to the vicinity of Echo, California and stationed the outfit car on a siding parallel to and west of the main track. The outfit car was assigned to decedent's personal use. (R 87.) Decedent lived in the outfit

car while on the job but if he wanted to go home and if he was close enough to go home, he could do so, though his outfit had to remain in the car. (R 95.)

The outfit car had two doors, one on each side of it, and two steps affixed to the car on each side as steps to the doors. (R 51-52.) It was dark red in color. (R 30.) The east door of the outfit car was within five feet of the trains moving on respondent's main track. (R 87-88.)

On October 28, 1949, in the morning, the body of decedent, severed in two, was found. One segment was found 52 feet south of the door on the east side of the outfit car; the other segment was an additional 41 feet south. (R 12-13.) Directly across from the east door of the outfit car, a footprint was found, pointing east, 18 inches inside the west rail of the main track. (R 12-13, 17-18.) At the same point appeared to be the mark of a scraping as though the side of a foot had been scraped there. (R 97.) The footprint was of the same size shoe as decedent had been wearing. (R 18.) Neither blood nor any part of the body of the decedent was found north of the footprint. (R 18-19.) Blood was found on the west rail of the main track 2 to 5 feet south of the footprint (R 26) for a distance of about 90 feet south (R 97-98).

There is testimony that the main track was straight for about a mile north of the footprint and for about half of a mile south of the footprint (R 19) and that the grade of the main track was slightly downward from north to south (R 92).

There is evidence that decedent was a careful man around trains and that he was not given to intoxication. (R 28.)

The evidence shows, too, that no signs were posted by respondent north of the track to indicate the presence of the outfit car or that the car was being used (R 19, 91-92) and that it was not the practice of respondent to give any notice of the presence of such cars other than to post a bulletin on the bulletin board in all telegraph stations (R 91, 102-103).

There is evidence that engine No. 2625, pulling a heavy freight passed the outfit car at 10:00 P. M. on October 27, 1949, going south. (R 103-105.)

There is evidence that examination of engine No. 2625 on the morning of October 28, 1949, at the request of the deputy coroner, showed blood on the right side of the cowcatcher and on the right front wheels (R 133-134, 140); the cowcatcher was bent back about three inches (Plaintiff's Exhibit 13).

Finally, there is the testimony of the engineer of locomotive No. 2625 (the fireman on the locomotive had died before the trial) that:

(a) As he passed the outfit car, he was going less than eighteen miles per hour. (R 105-106.)

(b) The headlight was on high beam and illumined the entire width of the track clearly, for a distance of about fifteen car lengths, approximately seven hundred and fifty feet, and indistinctly for some distance beyond. (R 106, 108.)

(c) The locomotive whistle was sounded one mile from Echo and again when the outfit car was seen on the siding. (R 107.)

(d) The bell was turned on ten car lengths, approximately five hundred feet, north of the outfit train. (R 108.)

(e) He was carefully observing the conditions on the track within range of the headlight and had seen no one in the area. (R 109.)

The jury returned a verdict for petitioner on Counts Two and Three of the complaint (C 48, 49) and judgment was entered thereon by the trial Court (C 51-52).

Respondent moved for a new trial and for judgment notwithstanding the verdict (C 60) which motions were both denied (C 126-132, Appendix A). Respondent then appealed to the District Court of Appeal, Third Appellate District, State of California, from the judgment and from the order denying respondent's motion for judgment notwithstanding the verdict. (C 60-62.)

Upon appeal, the District Court of Appeal reversed the judgment appealed from and directed the trial Court to enter judgment for respondent notwithstanding the verdict. (Appendix B.)

Petitioner then sought a hearing in the Supreme Court of the State of California on the judgment of the District Court of Appeal, which petition for hearing was denied (Appendix C), a certified copy of

the petition for hearing is a part of the record on this petition.

FEDERAL QUESTIONS RAISED BELOW.

The applicability of the FELA was raised by Counts Two and Three of the complaint of petitioner's in the trial court. (C 26-29.)

The question of the sufficiency of the evidence to warrant the jury's verdict for petitioner under the FELA was raised by respondent in its motion for judgment notwithstanding the verdict (C 60-61), by respondent upon appeal to the District Court of Appeal (C 60-62) and by petitioner in his petition for hearing by the Supreme Court of the State of California.

ARGUMENT.

I. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE JURY'S IMPLIED FINDING THAT DECEDENT WAS AN EMPLOYEE OF RESPONDENT AT THE TIME HE MET HIS DEATH, WITHIN THE MEANING OF THE FELA.

The District Court of Appeal said:

> ". . . there is not even a scintilla of evidence to indicate or support a finding that the decedent was engaged in any act connected with his employment at the time he met his death."
>
> 34 ACA at p. 857, 286 P2d at p. 50, Appendix C at p. 15.

It is suggested that the District Court of Appeal erred in its restrictive interpretation of the term "employment" within the meaning of the FELA.

Thus, in *Mostyn v. Delaware L & W & W.R. Co.*, 160 F2d 15, 17-18, cert. den. 332 US 770, 92 L ed 355, 68 S Ct 82, the plaintiff was employed by the defendant as a track worker. Bunk cars were supplied to the track workers as sleeping cars though the workers did not have to sleep there. The night of the accident in question, the plaintiff was sleeping outside the bunk car, on the ground and lying parallel to a track (the bed in the bunk was so verminous that plaintiff couldn't sleep on it). A train backed up and in some manner, plaintiff's right foot was severed. The Court there said:

> "It seems to us that when a railroad provides shelter or food or both to its employees, and they are using the accommodations so provided to prepare themselves for their work, or to rest and recuperate, they must be regarded as in its employ."

See, too, *North Carolina v. Zachary,* 232 US 248, 58 L ed 591, 34 S Ct 305; *Casso v. Pennsylvania R.R. Company,* 219 F2d 303; *Atlantic Coast Line Railroad Company v. Smalls,* 216 F2d 842, cer. gr., judg. rev. on other grounds 348 US 946, 99 L ed 306, 75 S Ct 439; *Southern Pac. Co. v. Libbey,* 199 F2d 341.

In the *Casso* case, supra, the plaintiff was injured when he was run over by a train operated by the defendant. He was a track employee returning at night to the bunk car supplied by the railroad com-

pany as living quarters for its track workers. The plaintiff had not worked the day prior to the accident but had gone into town. Returning from town to his bunk car, he was struck about a car length from the car in which he was housed. The railroad argued that the plaintiff was not an employee at the time of the accident on the theory that plaintiff was not back in his employment until he reached the bunk car where he was housed. The United States Court of Appeals, 3rd Cir., cited the decision of the United States Court of Appeals, 2nd Cir., in the *Mostyn* case, supra, with approval and said:

> "We do not think that the ascertainment of when a man is under the protection of the Act (FELA) is to be determined by any such mechanical rule as the defendant contends. This is no baseball game in which the runner must touch base in order to be safe." (219 F.2d 303, 306.)

The close analogy of the facts here to the facts in the *Mostyn* and *Casso* cases, supra, need not be labored.

In light of the following facts evidenced in the record:

(a) Decedent was regularly employed by respondent;

(b) Respondent regularly supplied decedent with an outfit car to be used as living quarters by decedent while on the job;

(c) Decedent regularly used the outfit car as living quarters;

(d) At the time decedent met his death, he was using the outfit car as living quarters while on the job; and

(f) Decedent was killed on respondent's tracks within five feet of the outfit car,

we respectfully urge that the jury could, as it did, find that decedent was in the employ of respondent at the time of his death.

II. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE IMPLIED FINDING THAT RESPONDENT WAS NEGLIGENT IN FAILING TO FURNISH DECEDENT WITH A SAFE PLACE TO WORK.

There is evidence that respondent placed the outfit car on a siding adjacent to a main track of respondent's and that the east door of the outfit car was within five feet of trains operating on the main track. The evidence shows, too, that approximately opposite to the east door of the outfit car, there was a footprint of a shoe of the same size as decedent's shoe, pointed east, eighteen inches inside the west rail of the main track. There was a trail of blood on the west rail starting about two to five feet south of the footprint and going south to the furthermost segment of decedent's body, a distance of about ninety feet. There is evidence that at ten o'clock the night of October 27, 1949, a train going south passed the point of the footprint and examination of the engine of this train, engine No. 2625, sometime between two o'clock and eleven o'clock, the morning of October

28, 1949 disclosed blood on the right side of the cowcatcher and on the right front wheel, and a three inch dent on the cowcatcher.

From this evidence it is not unreasonable to infer, as the jury presumably did, that decedent was struck by the train at the point where the footprint was noticed. It is not unreasonable to infer from the position of the footprint that decedent had come out the east door of the outfit car and started across the main track when he was hit. Further, because of the short distance between the door of the outfit car and the west rail of the main track, the jury might well have inferred that as decedent came out of the outfit car and started across the track, he did not notice the oncoming train.

These inferences are not "speculation run riot". *Moore v. Chesapeake & Ohio R. Co.*, 340 US 573, 578, 95 L ed 547, 551, 71 S Ct 428.

True, the inferences do not follow with the inexorableness of the conclusion in the Aristotelian syllogism; other inferences hostile to petitioner's position might be drawn. But in this posture of the case, with the jury having found for petitioner, it did not lie in the state District Court of Appeal to reverse because other inferences, contrary to petitioner, might have been drawn by the jury. *Stone v. New York, Chicago & St. Louis R. Co.*, 344 US 407, 97 L ed 441, 73 S Ct 358; *Wilkerson v. McCarthy*, 336 US 53, 93 L ed 916, 69 S Ct 413; *Lavender v. Kurn*, 327 US 645, 90 L ed 916, 66 S Ct 740; *Blair v. Baltimore & O. R. Co.*, 323

US 600, 89 L ed 490, 65 S Ct 545; *Tennant v. Peoria & P. U. R. Co.,* 321 US 29, 88 L ed 520, 64 S Ct 409; *Bailey v. Central Vermont R. Co.,* 319 US 350, 87 L ed 1444, 63 S Ct 1062; *Tiller v. Atlantic Coast Line R. Co.,* 318 US 54, 87 L ed 610, 63 S Ct 444, 143 ALR 967.

Assuming that petitioner's argument is valid thus far, wherein lay respondent's negligence which caused in whole or in part, the fatality? The jury might have concluded that respondent was negligent when it placed the outfit car on a siding when it knew or should have known that the outfit car had a door which opened on a main track less than five feet distant and took no precaution against the use of that entrance. From the jury's verdict, it appears that the jury did so conclude. Surely, then, the state District Court of Appeal erred in substituting its own judgment for the judgment of the jury as to the standard of care applicable under the circumstances. The test of negligence is classically, what a reasonable and prudent man would have done under such circumstances. This test is peculiarly one within the province of the jury. *Stone v. New York, Chicago & St. Louis Railroad Company,* supra; *Wilkerson v. McCarthy,* supra; *Tiller v. Atlantic Coast Line,* supra.

In this context, the state District Court of Appeal said "This leads us to the rule that if a choice of two equally usable doorways lay open to the decedent and he, of his own choice and volition, chose the dangerous way, particularly in light of his familiarity with bunk cars, tracks, trains and railroad practices in general (which must be logically assumed after, as

the evidence shows, at least three years of railroad employment), it cannot be other than logically considered that he assumed any additional risk in using the more dangerous way." (134 ACA at p. 857, 286 P 2d at p. 50, Appendix B at p. 16.)

But the argument of the District Court of Appeal is essentially the same argument as was made in *Wilkerson v. McCarthy,* supra, to which this Court replied "For while petitioner's failure to use a safer method of crossing might be found by the jury to be contributory negligence, the Act provides that 'contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee . . .' " (333 US at p. 61, 93 L ed at p. 504, 69 S Ct 413).

Further, if the state District Court of Appeal meant what it said when it said that decedent "assumed any additional risk in using the more dangerous way" the short answer is that Section 4 of the FELA (45 USC Sect. 54) provides that "in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, *such employees shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier* . . . ." (emph. supp.)

III. THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE JURY'S VERDICT THAT RESPONDENT WAS NEGLIGENT, WITHIN THE FELA, IN ITS OPERATION OF A TRAIN AND THAT SUCH NEGLIGENCE WAS A PROXIMATE CAUSE OF DECEDENT'S DEATH.

The evidence from which the jury inferred that engine No. 2625 struck and killed decedent has been detailed under II of this Argument.

The engineer of engine No. 2625 testified that as he approached the outfit car on the night in question, the speed of the train was less than eighteen miles per hour, the headlight was on and clearly illuminated the entire track for a distance of about seven hundred and fifty feet and indistinctly, for some distance beyond, that he saw nothing on the track and that he was carefully observing the conditions that existed on the track within range of the headlight.

The track is straight for a distance of approximately a mile north of the footprint with a very slight grade down from north to south, the direction the train was taking.

Are there any inferences that can reasonably be drawn from the facts that would show negligence in the operation of the train, remembering that the jury must have drawn such inferences since it gave a verdict to petitioner?

It is reasonable to believe that the jury believed the engineer's testimony with the exception that it did not believe his testimony that he was watching the track. If this be so, what follows? There is no affirmative evidence that the engineer was not watching the track but from these facts:

(a) The track is straight for about a mile north of the point of the accident;

(b) The headlight clearly illuminated the track for a distance of some seven hundred and fifty feet;

(c) The footprint was inside the west rail of the main track;

(d) There was blood on the right side of the cowcatcher and on the right front wheel; the front of the cowcatcher was dented; and

(e) The engineer did not see the decedent.

the jury could have inferred that at the instant of death, decedent was on the track and was struck by the engine. Further, the jury could have inferred that the engineer should have seen decedent since the track was straight, visibility good for a distance of about seven hundred and fifty feet and *decedent was in front of the train, on the track.* Therefore the jury could have drawn the further inference that the engineer was negligent in not having seen decedent. It requires no great mental leap to infer that the accident would not have happened if the engineer had seen decedent when it is recalled that the train was going less than eighteen miles per hour.

Again, it is conceded that these are but inferences. The jury did not have to draw them *but the jury did.* These inferences are grounded upon the physical facts in the case; they are not flights of fancy conjured up by a sympathetic jury to justify a verdict.

As was said in second section of this Argument, supra, this Court has iterated and reiterated the prop-

osition that where several different inferences may reasonably be drawn from the same set of facts, an Appellate Court may not substitute the inferences it draws for the inferences drawn by the jury.

IV. THE WRIT OF CERTIORARI IS APPOSITE HERE.

This Court has unmistakably made known its determination to issue the writ of certiorari in those cases, under the FELA, where the jury function of resolving disputed questions of fact and in drawing inferences from those facts, has been usurped by a Court. *Smalls v. Atlantic Coast Line Railroad Co.*, 348 US 946, 99 L ed 306, 75 S Ct 439; *Stone v. New York, Chicago & St. Louis Railroad Company*, supra; and see cases collected in *Wilkerson v. McCarthy*, 336 US 53, 71-72, 93 L ed 497, 509-510, 69 S Ct 413. The instant case is such a one and it would appear peculiarly appropriate for this Court to review this decision of a state Court, under the FELA, where that Court candidly stated that ". . . speaking with little fear of contradiction, we concur with the trial judge in his observation that 'the propositions of law applicable hereto are in such a state of confusion in the decisions of the higher Courts, including the highest Court of the land, that it (the trial Court) is unable to determine just what the law applicable to the case is.' " (134 A.C.A. at p. 856, App. B at p. 14.)

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated, December 12, 1955.

Respectfully submitted,

SIDNEY FEINBERG,

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BURKE & RAWLES,

WAYNE P. BURKE,

Of Counsel.

(Appendices A, B, C and D Follow.)

Appendix A

(Clerk's Tr. pp. 126-132.)

Filed Sep. 24, 1953,
W. J. Broaddus, County Clerk,
By CS Deputy.

[Title of Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL AND ORDER DENYING MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT.

Counts 2 and 3 of the complaints in these two cases are based upon the Federal Employers' Liability Act, 45 U.S.C. Paragraph 51, etc. The jury rendered a verdict in favor of the plaintiff on both counts.

The matter before the Court is a motion by the defendant for a new trial on these counts and also a motion for judgment notwithstanding the verdict.

On the 27th day of October, 1949, Ralph J. Keiper was an employee of the defendant as a welder. His principal work was along the tracks of the company. The defendant had taken the deceased in one of its cars to a small station at Echo and parked his car on a siding near the main line where a number of trains pass daily both day and night. There were no barriers between the car, which was furnished to the deceased as his abode while he was working for the company, and there were no warning signals or signs of any kind warning the occupants of this and other cars that were there at the time of danger. Sometime between dark on October 27 and daylight on October

28 he was run over by a train on the main line and killed.

The jury impliedly found that the defendant was negligent and that such negligence contributed to some degree to the decedent's untimely demise.

The defendant claiming that there was no evidence that he was an employee of the defendant at the time or that the defendant was negligent or that any negligence of the defendant contributed toward the decedent's death, makes these motions which now are engaging the attention of the Court.

The Court has read all of the decisions cited by both sides of this case, and they are numerous. As a result thereof this Court finds that the propositions of law applicable hereto are in such a state of confusion in the decisions of the higher courts, including the highest court of the land, that it is unable to determine just what the law applicable to the case is. It is to be remembered that proceedings in this case are had under Federal laws and not the State laws and that the decisions of the Federal and not the State courts are controlling. It must also be borne in mind that the law of comparative negligence prevails in this case and that no matter how negligent the deceased was, if it is shown that the defendant was negligent in any way and that such negligence proximately contributed toward causing the death of the decedent, the defendant is, to that extent, liable herein.

Therefore, even if it be conceded, which it well may, that the deceased was negligent in being where he was

at the time he was struck and killed by the train, this in itself does not dispose of the problem before us. The inference could well be drawn from the evidence, although no one actually saw it occur, from the fact that a scraping track of a human was found between the rails, that blood was found on the pilot of the engine and other parts of the train, and on the rails along there, that deceased was in front of the train at the time he was struck. It might also be inferred that he was there by reason of sleepiness or sickness or some other cause of inattentiveness to where he was going or standing. And it might also be inferred, that if suitable warning of danger existed there between his car and the main line track, and particularly if there would have been a barrier that would have obstructed his course that he would have been more attentive and not gone upon the track. I say that these inferences are possible under some of the decisions of the Federal Courts, and since the jury found that there was negligence and that such negligence was in part responsible for decedent's death, this Court feels that it cannot say that those 12 jurors were mistaken and that a contrary conclusion is the right one.

For instance, in the case of Bailey vs. Central, etc., 87 Law Ed. 1445, the court said:

> "An employer is under a common law duty to furnish his employees with a safe place to work, and where question of whether it was safe or not is debatable by fair minded men, question should be left to the jury to decide."

To the same effect are the cases of Tiller vs. Atlantic, etc., 87 Law Ed. 610, and Tennant vs. Peoria, etc., 88 Law Ed. 520, and Tiller vs. Atlantic, etc., 89 Law Ed. 465. And in the case of Lavender vs. Kurn, 90 Law Ed. 916, etc. the Court held the evidence was sufficient to show deceased was given an unsafe place in which to work and that when an inference is supported by probative facts and such inference justifies a verdict, the fact there may be other inferences which would lead to another conclusion is immaterial.

This Court is supposed to take its directive from the Federal courts, but, as above indicated, it is not possible to tell what that directive is. It is a fact that the courts are leaning more and more toward refusing to set aside juries verdicts in this kind of a case. This Court cannot do so here.

Both motions must be, and are, denied.

Dated this 24 day of September, 1953.

Lilburn Gibson,
Judge.

(Seal)

ADDENDA.

A reading of the foregoing opinion and order shows that some matters are not mentioned therein which perhaps should be referred to.

In its notice of intention to move for a new trial the defendant urged as one of the grounds, an excessive award of damages. Such point was not seri-

ously, if at all, urged in the motion, and the Court takes it that the point has been practically abandoned.

Another point raised is that the Court refused to give instructions submitted by the defendant that should have been given. A careful review of the instructions given and those refused has been made. The Court thinks the jury was fully and fairly instructed and that it would have been improper to have given the refused instructions.

In regard to the contention made that the evidence is insufficient to show that the deceased was killed while he was acting in the course of his employment or, in other words, actually employed at his job, it could well be argued that the statute could receive such an interpretation. But, on the other hand, the United States Supreme Court has interpreted it otherwise, and this Court, of course, is bound by such interpretation.

See Atlantic Coast Line Railroad vs. Meeks, 208 Southwestern 2d 359. There are other cases of similar import.

The Court also thinks that perhaps some further consideration should be given the statement hereinabove made that there is confusion in the cases of the highest courts relative to the sufficiency of the evidence necessary to sustain a verdict under the Federal Employers' Liability Act. The defendant, in its very able brief, has cited quite a number of cases and has carefully and fairly stated the gist thereof, from which it appears that a verdict cannot be ren-

dered on conjecture where there was no eye witnesses to the mishap. The case Atchison T. & S.F.R. Co. vs. Saxon, 284 U. S. 459, 76 Law Ed. 399, is an illustration, wherein we find this language:

> "Nobody saw the accident, no one can say with fair certainty how it occurred. Consistently with the facts disclosed, it might have happened in one of several ways without cause or negligence by the defendant. * * * What occasioned this distressing accident can only be surmised. It was necessary to show cause or negligence in order to establish the respondent's right to recover. The evidence fails to meet this requirement."

Which seems clear enough. But on the other hand, we have a line of cases headed by Lavender vs. Kurn, 327 U. S. 90 Law Ed. 922, in which we find this language:

> "It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike Haney, and there are facts from which it might reasonably be inferred that Haney was murdered, but such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses, and arrive at a conclusion opposite from the one reached by the jury."

Thus, in one line of cases by the same court we have the holding that the jury could not speculate and must decide the case upon the evidence, while the other line of cases holds the jury may reasonably infer, and thus speculate from the evidence, and although there may be all kinds of inferences derivable from the evidence, if the jury picks out a reasonable one, any others, although equally reasonable, must be rejected as immaterial. In other words, the interpretation of this Court to these decisions is that in one it is held the jury is not allowed to guess or speculate and in the other it is held that it can. And it is this humble Court's view, stated with the utmost respect to the higher courts, that this uncertainty should be dispelled in the very court where it has arisen.

I want to say in conclusion, that this case was most ably tried by counsel for the defendant and that it was certainly through no fault or oversight on his part that the verdict went in favor of the plaintiff. He tried the case in his usual careful and able manner.

Appendix B

(Vol. 134 A.C.A. 851.)

In the District Court of Appeal
State of California
Third Appellate District

3 Civil No. 8560

ONA C. KEIPER, as Administratrix of the Estate of Ralph J. Keiper, Deceased,
Plaintiff and Respondent,
vs.
NORTHWESTERN PACIFIC RAILROAD COMPANY, a corporation,
Defendant and Appellant.

OPINION

This appeal is from a judgment entered upon the verdict of a jury in favor of plaintiff as administratrix, awarding damages on account of the death of her husband.

In the early morning of October 28, 1949, the severed body of Ralph J. Keiper, a welder employed by appellant Northwestern Pacific Railroad Company, was found lying just outside of the westerly rail of the company's main line track at a siding south of Ukiah known as Echo. Near that point a narrow raised road-

way of dirt or gravel crossed the track at approximate right angles, and also the siding track lying just to the west of it. There was a gate on each side of the tracks where this road intersected the right of way fences.

The upper part of the severed body was found lying just on the southerly edge of this dirt or gravel roadway, while the lower part lay to the north and on the other side of the roadway about 20 feet from the upper part. On the siding which parallels the main track on the westerly side there had been spotted two so-called "outfit cars," the south end of the most southerly car being from 16 to 20 feet north of this raised dirt roadway. The lower part of the body lay nearly opposite the said south end of this car which had been allocated to the deceased as living quarters while working at Echo. In the middle portion of this car, on either side, there was a door below which had been permanently attached two steps leading to the ground, and along one side of each doorway was a metal handle or "grabiron" to assist one in using the steps. A short distance to the west of the car on the opposite side thereof from the main track, there had been placed a privy for the use of the deceased, and a path leading to it had been cut through the grass growing between it and the car.

There is no material conflict in the evidence. Plaintiff offered no direct proof of how the tragedy occurred. The factual situation was developed almost entirely by the defense. According to the testimony of his immediate superior, called as a defense witness, the

deceased, a lead welder in the employ of appellant, had been sent to Echo to build rail jetties where an adjacent creek had washed out a portion of the right of way. He had moved into the outfit car assigned to him "the day before." He was the only one who used it. It was not necessary for him to live there. He could have lived at home and driven back and forth had he chosen to do so. Outside of an emergency his assigned hours of work were from 7 to 11 a. m. if on daylight saving time, or 8 a. m. to 12 noon, and from 12:30 to 4:30 p. m. if on standard time. These assigned hours are not changed but the welding gangs have no specified hours due to the heat. If it was exceptionally hot they worked early. The work deceased was assigned to do was not of an emergency nature.

This same witness also testified that deceased would take an occasional drink; that he had never seen him intoxicated; and that deceased was a careful man around trains. He further testified that there was blood on the west rail of the main track approximately 90 feet south of the outfit car occupied by deceased; that there was what looked like a footprint near the entrance to this car between the two main line rails, and that about opposite the south end of this car there was also a scraping such as might have been made by the side of a foot. There was blood on the rails nearly opposite.

According to this same witness, from four to six trains passed over this area between 6:30 on the evening of October 27, 1949, and daylight the next morning.

In addition to this witness, defendant also called Harvey O. Peters, a special agent; Roy J. Connors, the locomotive engineer on the train that passed Echo about 10 o'clock on the night of October 27, 1949; and also W. J. Egan, the roundhouse foreman at Santa Rosa. The fireman who served with engineer Connors on the night in question had died before the date of trial.

Connors testified that his train consisted of 47 freight cars, 41 loaded and six empty. As he approached the outfit cars at Echo the speed of the train was about 18 miles per hour or less. The headlight was on high beam and illuminated the track 20 car lengths away; the track could be seen clearly for approximately 15 car lengths, but beyond that it would not appear distinctly. The locomotive whistle was sounded at the mile board, one mile from Echo and also as he came around the turn when he observed the outfit cars on the siding. He sounded the whistle a second time as he approached them. The locomotive bell was ringing. As he approached the outfit cars he saw nothing on the tracks and the fireman gave him no warning of any sort. He, Connors, had a full view of the entire width of the main track and was carefully observing conditions within the range of his headlights. He did not strike anyone, and when he was informed the next morning that a man had been killed at Echo, he looked the locomotive over but found no blood on it, and no one pointed out any blood to him. He would not be able to say whether there was any there.

W. J. Egan, the roundhouse foreman, testified that about 9 a. m. on October 28, 1949, he inspected this locomotive and found no blood on the pilot but did find eight or ten drops of blood on the No. 3 driver wheel which would be back approximately 25 feet from the front of the locomotive on the right side. He did not know whether it was human blood.

On rebuttal plaintiff recalled plaintiff's witness Reno Bartolomei who was a deputy sheriff and deputy coroner of Mendocino County at the time of the accident, but who at the time of trial was an investigator for the district attorney and an automobile salesman. He testified from a memorandum contained in the sheriff's file and made by him of a telephone conversation allegedly held by him with a Henry P. Dohring who, at the time of the accident was in charge of defendant's station at Ukiah. He asked Dohring to check the engines. Dohring later called him back and said that engine 2625 was checked and that blood was found on the right side of the cowcatcher, on the pilot and on the front wheel on the right side. Dohring, also called by plaintiff as a rebuttal witness, could not recall this conversation or incident.

This in substance is all of the relevant testimony appearing in the record of any probative value to indicate what happened. No one saw the accident, nor was there any evidence to explain what the deceased was doing on or about the track. His body was found apparently run over and severed by a train, and that is all.

So far as we are concerned here, the only question to be answered is whether the verdict of the jury in the sum of $37,500 in favor of plaintiff can be sustained by this evidence under the provisions of the Federal Employers' Liability Act. The appeal is from the judgment entered upon this verdict and from the order denying defendant's motion for judgment notwithstanding the verdict.

The Federal Employers' Liability Act, so far as relevant here, provides in substance that a common carrier engaged in interstate commerce shall be liable to those designated in the act for injury to or death of any employee "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." The act also provides that contributory negligence of an employee who meets death or is injured shall not bar recovery but that damages suffered shall be diminished in proportion to the amount of negligence attributable to the employee, provided however that such diminution shall not apply nor shall any doctrine of the assumption of risk apply in any case where there has been a violation by such common carrier of any statute enacted for the safety of employees and where this violation contributed to the occurrence of injury to or death of an employee.

All questions of substance presented in actions under this statute are federal questions upon which

the decisions of the federal courts are conclusive and binding upon all state courts. (*Atlantic Coast Line R. Co. v. Dixon,* 207 F.2d 899, 903; *Dice v. Akron C. & Y. R. Co.,* 342 U. S. 359, 361 [72 S.Ct. 312, 96 L.Ed. 398]; *Bailey v. Central Vermont R. Co.,* 319 U. S. 350, 352 [63 S.Ct. 1062, 87 L.Ed. 1444]; *Garrett v. Moore-McCormack Co.,* 317 U. S. 239, 244 [63 S.Ct. 246, 87 L.Ed. 239].) This being so it is quite obvious that as an intermediate appellate state court our function here is not to attempt any interpretation of the act itself but to ascertain if possible the applicable rule from the existing federal decisions. We cannot resolve conflicts, and we speak with but little authority in attempting to select from among the federal decisions an applicable rule. Thus without authority, but speaking with little fear of contradiction, we concur with the trial judge in his observation that "the propositions of law applicable hereto are in such a state of confusion in the decisions of the higher courts, including the highest court of the land, that it [the trial court] is unable to determine just what the law applicable to the case is."

Counsel have filed excellent briefs and have discussed the cases at some length. In the light of our inability to establish precedent or resolve conflicts or to announce a rule with any perceptible authority, we see but little virtue in discussing here in any detail the maze of cases referred to in the briefs. About all we can do is weigh the evidence appearing in the record and announce our opinion as to whether giving to it all the weight to which it is entitled the evidence

is legally sufficient to support the jury's implied finding of negligence on the part of defendant. In making such a determination we are satisfied that we must rely more upon what, in our opinion, would in the light of common, everyday contemplation and experience appear to amount to ordinary care, rather than upon any attempt to fit the facts before us into an indeterminate mold fashioned by the federal decisions.

First it may be said that there is not even a scintilla of evidence to indicate or support a finding that the decedent was engaged in any act connected with his employment at the time he met his death. In respondent's brief there appears this statement: "The evidence indicates that the deceased was on the railroad track at 10 o'clock P. M. on October 27, 1949, between the rails of the main line track, opposite to the entrance to his bunk car. This is indicated by the following: A. A foot print was found at this point, 18 inches inside the west line, of the same size as the shoe worn by Mr. Keiper at the time of his death. It was deeper on one side than the other, and was headed in an easterly direction."

There is no evidence to the contrary. This appears then as an admission that the death apparently did not occur before 10 p. m. It was not even suggested by anything in the evidence or otherwise that it did, or that the deceased was welding or otherwise working at that time of the night, or that he was engaged in any activity of any nature on the tracks at that hour which could be considered as being even remotely connected with his employment. The record is abso-

lutely silent, and no plausible theory has been suggested, as to why he was there or what he was doing.

Respondent urges the following circumstances as constituting evidence of negligence under the act on the part of appellant:

"I. The bunk car furnished to deceased as living quarters had an entrance on the side next to the main line track, less than five feet from passing cars.

"II. The bunk cars were dark red, making them difficult to observe at night.

"III. No warnings were given by signs or otherwise to warn trainmen on the main line track of the fact that there were workmen living in these cars.

"IV. No precautions were taken by the defendant to protect workmen, living in bunk cars, against passing trains."

Taking these specifications in order, the only evidence in the record is that the "bunk" or "outfit" car furnished to deceased had a similar entrance on both sides, and that when the body of deceased was discovered the doors to both these entrances were locked. There is no evidence that the deceased was, at the time, using the east entrance with the car spotted as it was on the siding west of the main track, or that the entrance on the west side was out of order or that there was any condition whatsoever that made it any less usable than the entrance on the east side. This leads us to the rule that if a choice of two equally usable doorways lay open to the decedent and he, of his own choice and volition, chose the dangerous way,

particularly in light of his familiarity with bunk cars, tracks, trains and railroad practices in general (which must be logically assumed after, as the evidence shows, at least three years of railroad employment), it cannot be other than logically considered that he assumed any additional risk in using the more dangerous way. We do not see how appellant, as his employer, could be held liable unless it were in some manner responsible for his making a choice of using the more dangerous of the two doors. The reason for two doors is obvious, for it is a matter of common knowledge that sidings occur on both sides of railroad main tracks, and the obvious purpose of having a door on each side is so that whether a car is spotted on one side or the other those having occasion to enter or leave such a car may do so on the side away from the main track.

Next respondent states that the cars were red and hence were difficult to see at night. We fail to see how this fact has any bearing on the situation. None of the cars was struck by the train. There is no evidence that the cars were not seen by all train crews as they approached and passed the cars, or that the conduct of any train crew would in the exercise of ordinary care have been any different had the cars been luminous or painted any other color. Also it is a matter of common knowledge that red is, and for many years has been, a color quite generally used on box cars, and it would be hardly logical to say that all of a sudden and for no especial reason, the spotting of bunk cars so painted should amount to negligence. Connors, the engineer of the locomotive on which the blood was

found, testified that he knew the cars were there; that he sounded the whistle at the mile board one mile from Echo; that the headlight was on high beam and that the track could be seen clearly for approximately 15 car lengths ahead; that the whistle was sounded again as he came around the turn and observed the outfit cars on the siding, and a second time as he approached them; that also the locomotive bell was ringing. As appellant has pointed out, even though this testimony be entirely discounted and disbelieved, still there is no evidence in the record to support any inference or even a speculation that the color of the cars had any causal connection whatever with the death of deceased.

The above reasoning can in general be applied to respondent's third specification of negligence. There is no evidence that respondent violated any common or generally recognized custom or practice among railroads or acted in any manner without ordinary care and prudence in not posting special signs or otherwise to warn trainmen on the main track that there were workmen living in these cars. There is no evidence in the record to indicate that the absence of any warning "signs or otherwise" had any causal connection with the death. As pointed out above, Connors, the locomotive engineer, stated that he observed the cars and blew the whistle; that he had blown it twice before, once at the mile board and once as he rounded the bend which was estimated by plaintiff's witness Bartolomei to be about a mile north of the bunk car. Connors also testified that the bell was ringing; that

it had been turned on approximately 10 car lengths from where it was supposed to be heard, and that it rang automatically. He also testified that the speed of the train was 18 miles per hour or less.

There is nothing in the record to indicate that the operation of the train would have been any different had warning been "given by signs or otherwise to warn trainmen on the main line tracks of the fact that there were workmen living in these cars." Even if all defense testimony be disbelieved entirely, there is no evidence of any negligent operation of the train, unless it is to be inferred or presumed from the fact alone that because deceased was found dead and his body severed that the operation of the train was negligent.

The record contains no evidence at all to indicate any departure by appellant or any of its agents, servants or employees, from common and established practices in railroading, or the violation of any statute or any departure from what common experience would dictate as a standard of ordinary care. This tragedy happened at night. There was no evidence of any light in or about the bunk car or anything at all to indicate that deceased was, or had any occasion to be, on or perilously near the main line track. Had he been in the bunk car provided for him there is nothing to indicate that he would not have been perfectly safe. Why he was on or about the main line track at or about 10 o'clock at night no one knows. There is no evidence from which even an inference may be logically drawn that he was there for any purpose in con-

nection with his employment. There is no evidence that he had any tools or equipment with him or even a light of any kind. There is no evidence that there was anything connected with his employment or personal needs to draw him at that time of night to any point at all on or east of the main track or indeed to any point east of the easterly wall of his bunk car. His privy was on the west side, away from the main track, and his bed presumably in the car. There is no evidence of any town, store, building, place of habitation, person or thing that might have drawn him across the track at that hour. Indeed there is not even evidence that he met his death by being run over by a train. There was testimony by plaintiff's witness Bartolomei that when he found the body the door on the east side of the bunk car was locked. There was other testimony that the doors on both sides were locked. It seems strange that a man, at least one experienced around railroads, in possession of his faculties and under normal circumstances, would at that time of night be, for no fathomable reason, where deceased must have been for his body to have been run over and severed by the train. Any hypothsis must of necessity be based upon pure speculation. It is true that respondent is entitled to the presumption that deceased was exercising due care for his own safety, but as a corollary it does not follow that indulgence in this presumption leads to the conclusion or presumption, or even inference, that appellant was negligent or that this negligence was the proximate cause of death. (*Looney v. Metropolitan R. Co.*, 200

U. S. 480, 488 [26 S.Ct. 303, 50 L.Ed. 564, 569].) If we are to speculate, it might as well be said that deceased fell on the rails as the result of a heart attack or some other organic or functional failure, or that someone killed him and placed his body on the track to lend the appearance of accident. In answer to this it might be said that even so the locomotive engineer or fireman, if they were maintaining a proper lookout, should have seen the body on the track. We do not feel that the law or reason binds appellant to any such degree of care under the appellation of ordinary care. Had the engineer or fireman known, or if in the exercise of ordinary care they should have known, or even if they had had any reason to anticipate anyone on the track at that point at that time of night, it might in reason be said that they should have been vigilant in maintaing a most careful scrutiny of every foot of track. But here we can think of nothing which, under the circumstances, might in reason have caused them to anticipate the presence of anyone on the track, or dangerously close to it, at that point, at that time of night, even though they were chargeable with knowledge that workmen were quartered in the bunk cars. We do not think that in order to comply with the standard "ordinary care" an engineer or fireman of a locomotive can be charged with the duty of carefully watching every foot of a track from point of departure to destination excepting those points where they know, or in the exercise of ordinary care should have reason to know or anticipate that the passage of the train might create a hazard to persons or property.

A right of way is owned and maintained by a railroad for the passage of its rolling stock, and excepting at known intersections or where the presence of children might be anticipated, or at known points of possible danger, or at points where it could, in the exercise of ordinary care, be reasonably anticipated, it seems that the train crews should be conceded some time for attention to their gauges and instruments and the management of their controls, and should not, under penalty of being found guilty of negligent conduct, be bound at all times to keep their eyes focused upon the track ahead.

We hold that under the circumstances here there was, at the time and place involved and in the exercise of ordinary care and prudence, no reason for the engineer or fireman to maintain a constant and intense vigil over each and every foot of the track ahead, for even though if charged with knowledge of the presence of workmen in the bunk cars, there appears no fathomable reason to expect the presence of any one of them on or perilously near the main track at that time of night.

In view of the salient points of similarity involved and persuaded by the reasoning and conclusions reached in *Lenz v. Union Pac. R. Co.*, 128 Neb. 99 [258 N.W. 33]; *Lammers v. Pacific Elec. Ry. Co.*, 186 Cal. 379 [199 P. 523]; and *Greene v. Atchison T. & S. F. Ry. Co.*, 120 Cal.App.2d 135 [260 P.2d 834, 40 A.L.R.2d 873]; and guided by the rules announced in *Moore v. Chesapeake & O. R. Co.*, 340 U.S. 573 [71 S.Ct. 428, 95 L.Ed. 547]; *Chesapeake & Ohio Ry. Co. v.*

Thomas, 198 F2d 783, 788; *Kansas City So. R. Co. v. Jones,* 276 U.S. 303 [48 S.Ct. 308, 72 L.Ed. 583]; *Looney v. Metropolitan R. Co.,* 200 U.S. 480, 488 [26 S.Ct. 303, 50 L.Ed. 564, 569]; and *Davis v. Alabama Great So. R. Co.,* 324 U.S. 846 [65 S.Ct. 676, 89 L.Ed. 1407], we hold that as a matter of law the record is totally devoid of evidence to support a finding of negligence on the part of defendant, and that the trial court should have granted appellant's motion for judgment notwithstanding the verdict.

The judgment is reversed with directions to the trial court to enter judgment for appellant notwithstanding the verdict.

Finley, J., pro tem.*

Van Dyke, P. J., and Schottky, J., concurred.

Filed August 1, 1955,
L. A. Endres, Clerk.

*Assigned by Chairman of Judicial Council.

Appendix C

Order Due
September 30, 1955

ORDER DENYING HEARING

After Judgment by District Court of Appeal
3rd District, Civ. No. 8560

In the Supreme Court of the State of California
In Bank

Keiper, as Administratrix, Etc.,

vs.

Northwestern Pacific Railroad Company.

Respondent's petition for hearing denied.

Gibson, C. J., and Carter, J. are of the opinion that the petition should be granted.

(Seal) Gibson
Chief Justice

I, William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 29th day of November A.D. 1955.

(Seal) William I. Sullivan, Clerk
By Di Noia,
Deputy Clerk

Filed Sept. 21, 1955
William I. Sullivan, Clerk
By R. J. Bell
Deputy

Appendix D

(Vol. 45 A.C. 149.)

In the Supreme Court of the State of California

IN BANK

3 Civil No. 8560

ONA C. KEIPER, as Administratrix of the Estate of Ralph J. Keiper, Deceased,
Plaintiff and Respondent,
vs.
NORTHWESTERN PACIFIC RAILROAD COMPANY, a corporation,
Defendant and Appellant.

DISSENTING OPINION

On denial of petition for hearing by the Supreme Court after decision by the District Court of Appeal, Third Appellate District, Civ. No. 8560 (134 A.C.A. 851, 286 P.2d 47) reversing with directions judgment of the superior court.

This case was tried before a most able and conscientious judge and a jury composed of substantial citizens of Mendocino County. The effect of the decision

of the District Court of Appeal is to deny plaintiff a jury trial in a case where such a trial is a matter of right under both the Constitution of the United States and of California as well as under federal and state statutes.

Since this is a case which may be reviewed by the Supreme Court of the United States, I am constrained to file a dissenting opinion to the order of the Supreme Court of California denying plaintiff a hearing for the purpose of calling attention to the errors in the opinion of the District Court of Appeal, on which its conclusion is based so that such errors may be called to the attention of the Supreme Court of the United States in the event the case is ultimately presented to that court.

The District Court of Appeal not only reversed the judgment in this case upon an erroneous assumption of the factual situation and application of the law thereto, but directed that a judgment be entered in favor of the defendant notwithstanding the verdict, thus depriving plaintiff of an opportunity to retry the case and present additional evidence in support of her causes of action in the event such evidence is available to her.

In my opinion the decision of the District Court of Appeal in this case not only erroneously denies plaintiff the right to a trial by jury but will result in a gross miscarriage of justice.

The decedent, Ralph Keiper was employed by the defendant railroad as a welder and had been sent to Echo, a siding south of Ukiah, to build rail jetties

where a portion of the right of way had been washed away. Two "outfit" (living quarters) cars had been spotted on the siding which paralleled the main line track. One of these cars was assigned to the decedent as his living quarters while on this job. He was the only one using the car. The siding on which the car was spotted was a few feet west of the main line track. In the middle portion of the car assigned to decedent there were two doors, one opening on the side next to the main line track, the other on the side away from it.

On the morning of October 28, 1949, the severed body of Ralph Keiper was found lying just outside the westerly rail of the defendant company's main line track. Inspection of the locomotive of a train which had passed the siding at about 10 p. m. the night before, showed that the pilot (cowcatcher) had been bent back and that there was blood on the wheels. Footprints and a scuff mark indicated that decedent had been between the rails of the main line track, about even with his living quarters car, when struck by the locomotive.

During the trial of this action, brought by Keiper's widow as administratrix of his estate, under the Federal Employers' Liability Act, the engineer of the locomotive above mentioned testified that his speed as he passed the Echo siding was about 18 miles per hour, that the headlight was on high beam and illuminated the track 20 car lengths away, that he sounded the whistle about one mile from Echo, that he saw nothing on the tracks as he approached the outfit cars.

The jury rendered a verdict in favor of plaintiff in the sum of $37,500. Defendant's motion for judgment notwithstanding the verdict was denied. The District Court of Appeal reversed the judgment entered on the verdict, holding that there was no evidence to support the jury's finding of negligence on the part of defendant.

The FELA (Federal Employers' Liability Act) provides in substance that a common carrier engaged in interstate commerce shall be liable to those designated in the act for injury to or death of any employee "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, boats, wharves, or other equipment." Prior to 1939 the accomplishment of the purpose of the act—to place on the employer some of the cost of the injuries and lives which it consumed in its operations—was somewhat hampered by the engrafting of defenses such as contributory negligence, assumption of risk, etc. The act was amended by Congress in 1939 to eliminate some of these defenses. (See *Wilkerson v. McCarthy*, 336 U.S. 53 [69 S.Ct. 413, 93 L.Ed. 497].) The act now provides that contributory negligence of an employee who meets death or is injured shall not bar recovery but that damages suffered shall be diminished in proportion to the amount of negligence attributable to the employee, provided however that such diminution shall not apply nor shall any doctrine of the assumption of risk apply in any case where there has been a

violation by such common carrier of any statute enacted for the safety of employees and where this violation contributed to the occurrence of injury to or death of an employee.

All questions of substance presented in actions under this statute are federal questions upon which the decisions of the federal courts are conclusive and binding upon all state courts (*Atlantic Coast Line R. Co. v. Dixon,* 207 F.2d 899; *Dice v. Akron, C. & Y. R. Co.,* 342 U.S. 359 [72 S.Ct. 312, 96 L.Ed. 398]; *Bailey v. Central Vermont R. Co.,* 319 U.S. 350 [63 S.Ct. 1062, 87 L.Ed. 1444]).

The jury verdict in favor of plaintiff was on two counts of his complaint, based respectively on negligence of the defendant in failing to provide a safe place to work, and upon negligence in the operation of the train. The issues raised on the appeal and decided by the District Court of Appeal in favor of defendant were: (1) Is there any evidence of negligence in failing to provide a safe place to work? (2) Is there any evidence on negligence in the operation of the train? (3) Is there any evidence that deceased was employed, within the provisions of the FELA, at the time of his death?

On the issue of employment, there was evidence that a bunk car had been assigned to the decedent and was transported by defendant from place to place on its lines for his living quarters, so that he might be close to his work. There was evidence that his job was that of welding rails, and at the particular time

in question, he was at the particular location for the purpose of welding rails in constructing jetties to prevent river damage.

In *Lukon v. Pennsylvania R. Co.*, 131 F.2d 327, it was held that an employee who had stopped work and was walking along the tracks in the direction of his home was within the act and an employee at the time. It was stated at page 329: "The Federal Employers' Liability Act was designed to be applied liberally for the protection of the railroad and other employees."

A member of a track gang employed in Tennessee who had left the work site for the weekend to go to his home in North Carolina, was held to be engaged in the duties of his employment when he returned to his assigned bunk car on Friday night after missing a train home, and was injured in the explosion of a lamp used to furnish light for the bunk car. (*Atlantic Coast Line R. R. v. Meeks,* 30 Tenn.App. 520 [208 S.W.2d 355].)

Where an engineer was on his way to the boarding house, but was shortly to depart upon his run, and had not gone beyond the limits of the railroad yard when he was struck, the court held that he was on duty and employed in commerce. (*North Carolina R. Co. v. Zachary,* 232 U.S. 248 [34 S.Ct. 305, 58 L.Ed. 591].)

A workman injured crossing the employer's tracks in his automobile while returning to the job in the morning was employed within the FELA. (*Flack v. Delaware, L. & W. R. Co.,* 45 F.2d 683.)

One who had finished his work and was leaving held to be still an employee under the FELA. (*Erie R. Co. v. Winfield,* 244 U.S. 170 [37 S.Ct. 556, 61 L.Ed. 1057].)

An employee who was assigned a bunk car to sleep in, but who, due to hot weather and vermin in the bunk car, decided to sleep outside, where a train cut off his foot, was held to be an employee at the time of the injury and entitled to recover from the railroad company. (*Mostyn v. Delaware, L. & W. R. Co.,* 160 F.2d 15.)

In a case very similar to the case at bar, decided in the Ninth Circuit, an employee struck on the main line track next to his assigned bunk car over an hour before he was due to begin work for the day was held to be "undoubtedly" in the defendant's employ and engaged in interstate service. The employee was hit while crossing the track to visit the toilet. It was stated: "By the condition of his employment, he was necessarily on appellant's premises and was making necessary preparation for the work in which he was to engage one and one-half hours later, in a reasonable manner and within a reasonable time." (*Chicago, M., St. P. & P. R. Co. v. Kane,* 33 F.2d 866.)

The evidence in the present case indicating negligence in furnishing an unsafe place to work includes testimony and exhibits showing that the bunk car furnished to decedent as living quarters had an entrance on the side next to the main line track, less than 5 feet from passing cars; that the bunk cars were dark in color, making them difficult to observe at

night; that no warnings were given by signs or otherwise to warn trainmen on the main line track of the fact that there were workmen living in these cars; that no precautions were taken by the defendant to protect workmen, living in the bunk cars, against passing trains. Many cases indicate that the dangerous condition of the premises can be inferred from the evidence in the record in the case at bar. (*Lavender v. Kurn,* 327 U.S. 645 [66 S.Ct. 740, 90 L.Ed. 916]; *Bailey v. Central Vermont Ry.,* 319 U.S. 350 [63 S.Ct. 1062, 87 L.Ed. 1444]; *Atlantic Coast Line R. R. v. Meeks,* 30 Tenn.App. 520 [208 S.W.2d 355].)

Evidence of negligence in the operation of the train includes: (1) Evidence indicating that the deceased was on the railroad track at 10 p. m. on October 27, 1949, between the rails of the main line track, opposite the entrance to his bunk car. This evidence includes footprints, scuff marks, blood on the pilot and driver wheels of the locomotive which passed the siding at 10 o'clock and blood on the west rail from the location of the footprint and scuff marks south for about 90 feet; the cowcatcher or pilot, was bent back about three inches indicating that the front of the engine had struck something; the fact that Mr. Keiper's body was severed in two pieces. (2) Evidence indicating that the view of the decedent at this location was such that the engineer should have seen him. This evidence includes testimony that the tracks were straight for one mile to the north and one-half mile to the south; that there were no weeds or other obstructions present to obstruct the view; that Mr. Keiper's clothing was of a type which should have been

easily seen; that the engine was equipped with a headlight which clearly illuminated the area from the engine to a distance of 750 feet ahead; that the engineer and fireman of the engine had ample opportunity to observe. (3) Evidence that the engineer failed to see Mr. Keiper. (4) Evidence that the engineer failed to blow the locomotive whistle to give warning, while passing the cars, excepting that he blew it at a distance of approximately one mile to the north.

The District Court of Appeal opinion cites eight cases as supporting its conclusion that, as a matter of law, the record was devoid of evidence to support a finding of negligence on the part of defendant. (*Lenz v. Union Pac. R. Co.,* 128 Neb. 99 [258 N.W. 33]; *Lammers v. Pacific Elec. Ry. Co.,* 186 Cal. 379 [199 P. 523]; *Greene v. Atchison, T. & S. F. Ry. Co.,* 120 Cal.App.2d 135 [260 P.2d 834, 40 A.L.R.2d 873]; *Moore v. Chesapeake & O. R. Co.,* 340 U.S. 573 [71 S.Ct. 428, 95 L.Ed. 547]; *Looney v. Metropolitan R. Co.,* 200 U.S. 480 [26 S.Ct. 303, 50 L.Ed. 564]; *Chesapeake & Ohio Ry. Co. v. Thomas,* 198 F.2d 783; *Kansas City Southern Ry. v. Jones,* 276 U.S. 303 [48 S.Ct. 308, 72 L.Ed. 583]; and *Davis v. Alabama Great Southern R. Co.,* 324 U.S. 846 [65 S.Ct. 676, 89 L.Ed. 1407].)

The Lenz case was decided in 1934, five years prior to the amendment liberalizing the FELA. The decision was apparently based on the defense of contributory negligence.

The Lammers case was not decided under the rules applicable to actions brought under the FELA. The

plaintiff there was a passenger, not an employee of the defendant. The question for decision there was whether the ejection of the intoxicated plaintiff was the proximate cause of his subsequent injuries. There was no evidence to indicate that plaintiff had been on the track.

In the Greene case, there was no evidence that the decedent—a licensee on the defendant's premises, not an employee—had been on the track nor that he had been clearly visible to the engineer. The court in the Greene case cited with approval the rule that an engineer could be held to have been negligent for failure to look or looking, failure to see a person on the tracks, but held that rule not applicable for the reason that there was no evidence to indicate that the decedent had been on the track.

Moore v. Chesapeake & O. R. Co., 340 U.S. 573 [71 S.Ct. 428, 95 L.Ed. 547], held that the jury may believe or disbelieve all or a part of the testimony it hears in arriving at its verdict. In that case it was held that the railroad was not negligent where its train ran over the decedent after he toppled from the train. The engineer was in the process of stopping when plaintiff was run over.

The Looney case was decided before the amendment of 1939. A case similar in its facts to the Looney case, but arising after 1939, held that the matter should have been submitted to the jury. (*Sweeting v. Pennsylvania R. Co.*, 142 F.2d 611.)

The other cases relied upon by the District Court of Appeal may be similarly distinguished. It is worthy

of note that in none of the cases cited by the District Court of Appeal was there any evidence that the deceased or injured person had been on the tracks in front of the train.

In contrast to the cases cited by the District Court of Appeal in support of its decision, many cases, both in California and in the federal courts, have indicated that evidence similar to that presented in the present case raised questions of fact properly submitted to the jury for determination. (*Leet v. Atchison, T. & S. F. Ry. Co.*, 66 Cal.App.2d 413 [152 P.2d 351]; *Weiand v. Southern Pac. Co.*, 34 Cal.App.2d 500 [93 P.2d 1023]; *New York Cent. R. Co. v. Marcone*, 281 U.S. 345 [50 S.Ct. 294, 74 L.Ed. 892]; *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54 [63 S.Ct. 444, 87 L. Ed. 610, 143 A.L.R. 967]; *Bailey v. Central Vermont Ry.*, 319 U.S. 350 [63 S.Ct. 1062, 87 L.Ed. 1444]; *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29 [64 S.Ct. 409, 88 L.Ed. 520]; *Tiller v. Atlantic Coast Line R. Co.*, 323 U.S. 574 [65 S.Ct. 421, 89 L.Ed. 465]; *Jesionowski v. Boston & Maine R. Co.*, 329 U.S. 452 [67 S.Ct. 401, 91 L.Ed. 416, 169 A.L.R. 947]; *Pennsylvania R. R. v. Goldie*, 182 F.2d 9; *Norfolk & W. Ry. Co. v. McKenzie*, 116 F.2d 632.)

Where, as here, questions of fact have been properly submitted to the jury, the appellate courts are not at liberty to set aside the jury's findings and draw other inferences and conclusions. Here there is ample evidence to support the findings of the jury. The fact that other inferences might reasonably be drawn from the same evidence does not justify the reversal of this

judgment. (*Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29 [64 S.Ct. 409, 88 L.Ed. 520]; *Johnson v. Southern Pac. Co.*, 154 Cal. 285 [97 P. 520]; *Seller v. Market Street Ry. Co.*, 139 Cal. 268 [72 P. 1006].)

I have heretofore in numerous concurring and dissenting opinions endeavored to point out what I believe to be a trend in the decisions of both the Supreme Court of California and some of the District Courts of Appeal to deprive litigants of their constitutional right to a trial by jury. (*Rodabaugh v. Tekus*, 39 Cal.2d 290 [246 P.2d 663]; *Hawaiian Pineapple Co. v. Industrial Acc. Com.*, 40 Cal.2d 656 [255 P.2d 431]; *Better Food Mkts., Inc. v. American Dist. Tel. Co.*, 40 Cal.2d 179 [253 P.2d 10]; *Atkinson v. Pacific Fire Extinguisher Co.*, 40 Cal. 2d 192 [253 P.2d 18]; *Sutter Butte Canal Co. v. Industrial Acc. Com.*, 40 Cal.2d 139 [251 P.2d 975]; *Mercer-Fraser Co. v. Industrial Acc. Com.*, 40 Cal.2d 102 [251 P.2d 955]; *Gill v. Hearst Publishing Co.*, 40 Cal. 2d 224 [253 P.2d 441]; *Goodman v. Harris*, 40 Cal.2d 254 [253 P.2d 447]; *Pirkle v. Oakdale Union etc. Sch. Dist.*, 40 Cal. 2d 207 [253 P.2d 1]; *Burtis v. Universal Pictures Co., Inc.*, 40 Cal.2d 823 [256 P.2d 933]; *Kurlan v. Columbia Broadcasting System, Inc.*, 40 Cal.2d 799 [256 P. 2d 962]; *Weitzenkorn v. Lesser*, 40 Cal.2d 778 [256 P. 2d 947]; *Turner v. Mellon*, 41 Cal.2d 45 [257 P.2d 15]; *Barrett v. City of Claremont*, 41 Cal.2d 70 [256 P.2d 977]; *Estate of Lingenfelter*, 38 Cal.2d 571 [241 P.2d 990]; *Gray v. Brinkerhoff*, 41 Cal.2d 180 [258 P.2d 834]; *Estate of Welch*, 43 Cal.2d 173 [272 P.2d 512].) Since the decision of the District Court of Appeal in

the case at bar falls into the pattern of the last cited cases, I cannot refrain from again expressing my disapproval of this trend which, in my opinion, is pervasive and perversive of one of the most sacred constitutional guarantees heretofore enjoyed by the American people.

From the foregoing it is clear that the Supreme Court of California should have granted plaintiff's petition for hearing in this case and affirm the judgment of the trial court.

Carter, J.

Filed Sept. 22, 1955.

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HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 571

ONA C. KEIPER, as Administratrix of the Estate of Ralph J. Keiper, Deceased,

Petitioner,

vs.

NORTHWESTERN PACIFIC RAILROAD COMPANY, a corporation,

Respondent.

Respondent's Brief in Opposition to Petition for Certiorari

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Respondent's Brief in Opposition to Petition for Certiorari

Believing that there is no special or important or other reason for the review, by this Court, of the judgment below respondent, in opposition to the petition for certiorari and in support of its position, respectfully shows:

The facts are stated in the opinion of the California District Court of Appeal (App. B to Pet. p. 8ff). The statement by the Court is not questioned and is substantially repeated in the statement of the case in the petition. The short of the case is this:

The body of a man, employed by respondent railroad as a welder, was found early one morning upon the railroad track. The body was severed in two. It was obvious that it had been run over by at least one railroad train. This could have been the cause of death. There was no evidence that it was. There was nothing else in the case helpful to the plaintiff. If the evidence, offered in defense, was believed it showed that there was no negligence on respondent's part. If it were not believed, under the controlling decision in *Moore v. C. & O. Ry. Co.*, 340 US 573, such disbelief in no sense provided support for a finding to the contrary. The case is left as one of a dead man found alongside a railroad track. It is one selected by *Prosser, Torts,* 2ed., p. 199, as typical of cases where recovery can not be had. Prosser says:

> "It is often said that negligence must be proved, and never will be presumed. The mere fact that an accident or an injury has occurred, with nothing more, is not evidence of negligence. The fact that a man is found dead upon a railway track after a train has passed is no proof that the train was run without proper care."

The single question presented is whether the evidence warranted submission to the jury. Two California appellate courts have held that it did not, the District Court of Appeal for the Third Appellate District by its affirmative decision and the Supreme Court of California by denial of a petition for a hearing. What it was doing was stated by the District Court of Appeal as follows (App. to Pet. p. 14):

> "About all we can do is weigh the evidence appearing in the record and announce our opinion as to whether giving to it all the weight to which it is entitled the evidence is legally sufficient to support the jury's implied finding of negligence on the part of defendant."

The petition does not claim that the court below decided any federal question of substance not heretofore determined by this Court, or decided any question in a way probably not in accord with applicable decisions of this Court or any question of statutory construction or application. And it did not.

The petition argues that the Court below decided that the deceased was not an employee of respondent at the time he died and, by consequence, decided the case upon the ground that the Federal Employers' Liability Act did not apply. To this end the petition wrenches from its context the statement of the Court that there was not "a scintilla of evidence to indicate or support a finding that the decedent was engaged in any **act**[1] connected with his employment at the time he met his death." The argument is founded on a misconception of the decision of the court.

The Court below made it abundantly clear that it was deciding the case upon the basis of the existence of the employer-employee relationship and the application of the Federal Employers' Liability Act. The opinion summarized the provisions of the Act and then pointed out, with citation of appropriate supporting authority, that:

> "All questions of substance presented in actions under this statute are federal questions upon which the decisions of the federal courts are conclusive and binding upon all state courts."

It then determined that the evidence was insufficient to warrant submitting to the jury the question of negligence under the Federal Employers' Liability Act. Its statement that there was no evidence that the deceased "was engaged in any act connected with his employment" was used in con-

1. All emphasis by bold-face type is ours.

nection with whether the accident happened during his normal tour of duty and whether he was at work at the time and place of the accident, as this might bear upon whether his presence at that time and place reasonably could be anticipated (cf. *Jones,* 276 US 303). So in immediate sequence it is pointed out that upon petitioner's theory death did not occur before 10 p.m. (outside of the normal hours of work); that there was no suggestion in the evidence "that the deceased was welding or otherwise working at that time of the night, or that he was engaged in any activity of any nature on the tracks at that hour which could be considered as being even remotely connected with his employment." Again it pointed out that there is nothing which would support an inference that he was there for any purpose in connection with his employment; that there was no evidence "that he had any tools or equipment with him or even a light of any kind."

Far from being in conflict with any decision of this Court the case is controlled by *Kansas City etc. Co. v. Jones,* 276 US 303.[2] The accident happened in a train yard where it could be anticipated that men were at work. The deceased was a car inspector. His body was found between the main track and a parallel track. The probability was that he was killed by a train going north on the main track. A freight train was being made up on the parallel track. The theory was that he was engaged in inspecting the cars and so absorbed in his work that he did not see or hear the approaching train. There was evidence that its bell was not ringing. [There was no evidence that it whistled.] Dealing

2. The opinion is quite short. Only the controlling facts are stated. A more detailed statement of the facts appears in one of the opinions below reported in 282 S.W. 309 (Tex. Civ. App.). This is not the judgment under review. That came at a later stage (291 SW 528).

first with the suggestion, "the hypothesis" to use the language of the Court, that decedent was so absorbed in his work he was not aware of the approach of the train this Court disposed of the case as follows:

> "At best, it is a mere guess that he was so engaged, still more than he was absorbed in such work. The main track was straight and the train was making a great noise and showing a bright light as it approached. Nothing except imagination and sympathy warranted a finding that the death was due to negligence of the petitioner rather than to that of the man himself. It is unnecessary to consider whether, if the case for the plaintiff was stronger, the principle of *Chesapeake & Ohio R. Co. v. Nixon,* 271 US 218, 70 L ed 914, 46 Sup. Ct. Rep. 495, would apply."[3]

The brief statement of the facts in *Jones* is the statement of essential features making the case far stronger for the plaintiff than the case at bar.

It is respectfully submitted that the petition should be denied.

Dated at San Francisco, California, December 28, 1955

ARTHUR B. DUNNE

Attorney for Respondent,
Northwestern Pacific Railroad Company

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3. The reference to *Nixon* is a reference to the doctrine of assumption of risk. Before the 1939 amendment of the Federal Employers' Liability Act assumption of risk was a defense. It was eliminated by the amendment of 1939 but *Jones* makes it abundantly clear that so far as its controlling authority is concerned the 1939 amendment is without significance because *Jones* went upon a ground making it "unnecessary to consider" the doctrine of assumption of risk.